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FREEDOM OF PUBLIC DISCUSSION.

THE process of continual readjustment between the needs of society and the protection of individual rights is nowhere more conspicuous than in the history of the law of defamation. If we look back to the time when the law defining that offense became substantially settled, we find prevailing a conception of such relative rights which is in many respects the antithesis of that which prevails to-day. Yet the law defining the affirmative offense, with its rigorous presumptions of falsity, malice, and damage, remains practically unchanged. It seems to have been thought that the vast increase in facility and area of communication, resulting from the use of the post, the telephone, the telegraph, and the modern printing press, justified the stringent principles of the law which had been formulated before such methods of communication were dreamed of. The development of the law, in accommodation to this vast change in the means of communication, has been in the direction of enlarging the scope of those principles of immunity, or privilege, some perception of which was coeval with the beginnings of the law upon the subject. Certain fundamental considerations have guided this growth. Immunity in defamation implies some freedom in the publication of matter which proves to be mistaken or false. It follows, necessarily, that persons defamed must suffer without remedy. The plainest principles of justice require, therefore, that immunity should be granted only within such limits as can be justified upon reasonable grounds. In some cases the possible public benefits of free communication may be equalled or counterbalanced by public evils. In such cases no immunity is granted, since the private injury would involve no compensating public benefits, save such as were offset by public

evils. On the other hand, there are cases in which the public benefits of free communication are so great that immunity must be granted however serious may be the individual injury, one overshadowing the other to such an extent that only the public interest can be regarded. In such cases the immunity is absolute. Within these two extremes come the various occasions on which there is a duty or interest which justifies some freedom of communication, but only so long as it is directed toward the accomplishment by the least harmful methods of the purpose for which the occasion exists. In such cases the immunity is qualified, or conditional, and is lost if the occasion be used for ulterior purposes. In all cases, in short, the existence and extent of the privilege is determined by balancing the needs of society with the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. Immunity should always be denied when the sacrifice of individual right outweighs the public good to be derived from it.[1]

In the light of such considerations, what is the nature and extent of the freedom which the law permits in the discussion of matters of public interest? That some distinction should be made between such matters and mere private gossip admits of no doubt; but there has been considerable difference of opinion — which, however, steadily lessens as we approach our own time — as to what matters properly come within this designation. In point of time, among the subjects which are now recognized as involving legitimate public interest, literary criticism first enjoyed complete liberty. Indeed, long after printing became common the view prevailed that an author who submitted his work to public judgment had, in this respect, no private rights at all. It was considered something outside the province of law, like an affair of honor, to attack an author's character as freely as his book; he enjoyed similar liberty in defending himself, and the feud was properly fought out in a literary rather than in a judicial arena. Meanwhile, with respect to political affairs, which are now regarded as matters of supreme public interest, the situation was otherwise. So long as the political pyramid rested upon its apex, instead of its base, all discussion of principles or persons was prohibited under the most severe penalties. In process of time, the dawning consciousness of the advantages of freedom of discussion in political

[1] Post Publishing Co. *v.* Hallam, 16 U. S. App. 613; Coleman *v.* MacLennan, 78 Kan. 711; Scripps *v.* Foster, 41 Mich. 742.

affairs was accompanied by the realization of a conviction that the license of literary criticism should be restrained, and that the personal character of an author had claims to legal recognition as well as the public interests of the state. The significance of the gradual approximation of a uniform rule regulating the discussion of these two subjects is that freedom of literary criticism, being the first subject of public interest upon which the right to comment was formulated upon rational grounds, has exercised a marked influence on the gradual recognition of similar freedom of discussion in political affairs.[1]

The interest of private citizens in public affairs requires freedom of discussion rather than immunity in the statement of facts.[2] The truth is available at all times to every one. Protection in the communication of supposed facts, in all those cases where a duty or interest in disclosure exists, is otherwise provided by the general doctrine of conditional immunity or privilege. Discussion, as the term implies, is comment upon given facts; it is the expression of opinion by way of inference or conclusion from established facts. In its broadest aspect it is the judgment of acts and things from appearances. As such, its legal justification depends, not upon its truth in fact, but upon its "fairness" as a deduction from the premises of fact upon which it is based. Not only may that which is untrue in fact be fair as comment,[3] but the ultimate public service of discussion is that it affords a means of combating abuses, or offenses, or insidious corrupting

[1] Bower, Code of the Law of Actionable Defamation, 379; Stephen, Hist. Crim. Law of England, ii, 376. The contrast between the points of view from which the subjects have been regarded may be indicated by the fact that Chief Justice Ellenborough, who, in 1808, in Carr *v.* Hood, 1 Camp. 355, formulated the principles of literary criticism in terms which are still cited, had, four years before, in Rex *v.* Cobbett, 29 How. St. Tr. 49, expressly followed the *dictum* of Lord Holt, then a century old, that "if persons should not be called to account for possessing the people with an ill opinion of the government, no government can subsist, for it is very necessary for all governments that the people should have a good opinion of it"; and he told the jury that "if a publication be calculated to alienate the affections of the people by bringing the government into disesteem . . . it is a crime."

[2] Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, *per* Holmes, C. J.

[3] Speight *v.* Syme, 21 Vict. L. R. 672. "Fair comment does not negative defamation, but establishes a defense to any right of action founded on defamation. To succeed upon the plea of justification the defendant must prove not only that the facts were truly stated, but also that the innuendo is true. He must justify every injurious imputation. Upon fair comment, however, if it be established that the facts stated are true, the defense of fair comment will succeed even if the imputation or innuendo be not justified as true, but be fair and *bonâ fide* comment upon a matter of public interest. Walker *v.* Hodgson, [1909] 1 K. B. 239, *per* Buckley, L. J.

influences, which lie hidden by concealment and perjury from judicial investigation. To prohibit criticism in matters of public interest unless the critic could vouch the truth in fact of his comment would be incompatible with the principles of popular government. Abuses might exist; there might be misconduct on the part of public men; there might be extravagance and corruption; yet no person would venture to speak. Hence the law protects and encourages the interchange of opinion so vital to the conduct of popular government, even though others may believe, and it may subsequently appear, that the imputation was in fact mistaken and unjust.

The overwhelming weight of authority holds that protection extends to comment alone. There is some authority, however, for the extension of immunity to statements of fact.[1] This view, which,

[1] This view has been consistently maintained in Kansas and South Dakota. Coleman *v.* MacLennan, 78 Kan. 711; State *v.* Balch, 31 Kan. 465; Myers *v.* Longstaff, 14 S. D. 98; Ross *v.* Ward, 14 S. D. 240; Boucher *v.* Clark Publishing Co., 14 S. D. 72. It appears to be the prevailing rule in Iowa and Maine. Mott *v.* Dawson, 46 Ia. 533; Bays *v.* Hunt, 60 Ia. 251; State *v.* Haskins, 109 Ia. 656; State *v.* Keenan, 111 Ia. 286; Klos *v.* Zahorik, 113 Ia. 161; Cherry *v.* Des Moines Leader, 114 Ia. 298 (but see Clifton *v.* Lange, 108 Ia. 472, and the incidental reference to the doctrine in Morse *v.* Times-Republican Printing Co., 124 Ia. 707); Bearce *v.* Bass, 88 Me. 521; O'Rourke *v.* Lewiston Daily Sun Publishing Co., 89 Me. 310. See also Marks *v.* Baker, 28 Minn. 162. Other isolated cases give a measure of support to this view. Evening Post Co. *v.* Richardson, 113 Ky. 641; Burke *v.* Mascarich, 81 Cal. 302; Crane *v.* Walters, 10 Fed. 619; Palmer *v.* Concord, 48 N. H. 211; Briggs *v.* Garrett, 111 Pa. St. 404; Jackson *v.* Pittsburgh Times, 152 Pa. St. 406; Ferber *v.* Gazette, etc. Assn., 212 Pa. St. 367; Express Co. *v.* Copeland, 64 Tex. 354; Knapp *v.* Campbell, 14 Tex. Civ. App. 199. See also Tawney *v.* Simonson, 124 N. W. 229 (Minn.). In England, in an early case involving a violent denunciation of a Parliamentary candidate, Sir James Mansfield, C. J., said: "If the words be actionable in themselves, it is quite immaterial whether they were spoken of him as a candidate or not. It seems to be supposed that the situation of a candidate for Parliament is such as to make it lawful for any man to say anything of him. To that proposition I cannot assent; nor is it to be collected from any of the cases which have been cited. It would be a strange doctrine indeed that, when a man stands for the most honorable situation in the country, any person may accuse him of any imaginable crime with impunity." Howard *v.* Astley, 1 B. & P. N. R. 47. In the subsequent cases of Dunscombe *v.* Daniel, 1 W. W. & H. 101, and Pankhurst *v.* Hamilton, 3 T. L. R. 500, the privileged occasion in such a case was more explicitly conceded, but in both cases there was actual malice. But in George *v.* Goddard, 2 F. & F. 689, and Wisdom *v.* Brown, 1 T. L. R. 412, involving defamatory charges made against a candidate in a meeting of rate-payers for the election of parish officers, two successive Chief Justices of England held the occasion to be privileged. There is high authority in Scotland to the same effect. In Bruce *v.* Leisk, 19 R. 482, in granting immunity to an elector who had falsely charged a candidate in a municipal election with having been bankrupt, and having made a disreputable failure, Lord President Robertson said: "I think that when electors are considering, with laudable

of course, renders superfluous any distinction between comment and statement, has been for the first time thoroughly developed by the Supreme Court of Kansas in a recent case involving the defamation of a candidate for public office.[1] The argument is this: The established doctrine of privilege protects statements made in the performance of a duty or the protection of an interest. It is of the deepest interest to the public that they should know facts which go to show that a candidate for office is unfit to be chosen. Therefore, every one should have the right to give the public the benefit of any information he may have affecting the fitness of a candidate. Can it be possible, it is asked, that public policy will make privileged an unfounded charge of dishonesty or criminality against one seeking private service, when made to the private individual with whom service is sought, and yet will not extend the same protection to him who in good faith informs the public of charges against applicants for public service? Is it not at least as important that the high functions of public office should be well discharged as that those in private service should be faithful and honest? Or, again, are the moral and social duties of great religious, fraternal, or charitable organizations to inform their members of the misconduct of a fellow member or officer any higher or stronger than that of electors to keep the public administration pure by disclosures respecting the character and conduct of candidates for public office?

The argument for immunity in the statement of facts concerning a candidate for an elective office — the only occasion on which the claim seems to have any weight — may be put more forcibly without going so far afield. In the case of a candidate for an appointive office it may well be urged that there is no necessity for a general publication, inasmuch as the selection rests with a particular official or authority, to whom alone publication should be made; and of course

interest, who shall be elected, they are quite entitled to state to other people, similarly concerned, what they know, or believe they know, upon the delicate subjects which are then mentioned. That the statements are injurious and invidious is quite true; but then, unfortunately, that brings us into the region also of the duty of an elector to give due weight to them, and to communicate them to others whom he is legitimately seeking to influence. I do not think that we should thereby be giving any unlimited license to slander during an election. We do not lay it down that anybody is entitled to say anything against a candidate. Our decision is merely that the occasion of the speaking being what it was, and the thing said what it was, there is no presumption in law that there was malice."

[1] Coleman *v.* MacLennan, *supra.*

the same reasoning applies with particular force to statements affecting one who holds an office, in which case charges affecting his fitness should be made directly to the official or authority having the power of removal. Communications so made to the appointing or removing authority are unquestionably privileged. In the case of a candidate for an elective office every voter certainly has an interest, if not, indeed, a duty, in common with every other voter. But in this case it is an interest or duty which the voters themselves can alone protect or discharge. The choice rests directly and exclusively with them, and there would seem to be no logical objection to the conclusion that, in accordance with established principles, a voter should be protected in making a communication to his fellow voters of facts relating to a candidate for their suffrage.

The answer to this argument has reference to the difference in the area of defamation. The conditional immunity extended to a statement of fact to a master concerning a servant, or one applying for service, covers a statement to the master only, and the injury, if any, done to the servant's reputation is with the master alone. This is the extent of the sacrifice which the rule compels the servant to suffer in what was thought to be, when the rule became law, an important interest of society. But if the immunity were to apply generally, then a person who offers himself as a candidate must submit uncomplainingly to the loss of his reputation, not with a single person, or with a particular class of persons, but with the public at large, whenever an untrue charge is made.[1] It is, however, an established principle of the law of defamation that, given the common interest or duty which creates the privileged occasion, any publication reasonably necessary to protect that interest or to discharge that duty, is privileged; and this is the case even though it results in the incidental publication to persons having no duty or interest.[2] It would be a radical departure from fundamental principles to deny or limit the privilege because of the wide area of the interest or duty. Moreover, the cases disclose an area of publication in cases of unquestioned privilege coextensive with that under discussion. Charges made against an officer by a voter to his fellow voters assembled in a town or parish meeting have been held to be privileged.[3] Why, then, should not a statement made

[1] Burt *v.* Advertiser Newspaper Co., 154 Mass. 238; Post Publishing Co. *v.* Hallam, 16 U. S. App. 613. [2] Boxsius *v.* Goblet Frères, [1894] 1 Q. B. 842.

[3] Bradley *v.* Heath, 12 Pick. (Mass.) 163; Smith *v.* Higgins, 16 Gray (Mass.) 251; Bradford *v.* Clark, 90 Me. 298.

by a voter in the same meeting convened to elect an officer be governed by the same rule?[1]

However, logic is not necessarily law. The whole doctrine of immunity in defamation is based upon public policy, and the only valid objection to protecting statements of fact in relation to candidates for elective office rests upon such considerations. It is the conviction that such a doctrine would do the public service more harm than good. The danger that honorable and worthy men may be driven from politics and public service by allowing such latitude in attacks upon personal character outweighs any benefits that might accrue to the public.[2] Such license would create a disinclination for public life on the part of honorable men by making them feel that it was incompatible with wholesome self-respect and decent reputation; it would drive men of sensibility away from its opportunities in sheer disgust, and leave public employment to callous and self-seeking adventurers. It seems plain that immunity in fair comment extends the utmost protection to free communication in matters of public interest that is compatible with a proper regard for personal rights. This at all events is the concensus of opinion among English-speaking people.[3]

The distinction is fundamental, then, between comment upon given facts and the direct assertion of facts. And the significance of the distinction is plain. If the facts are stated separately, and the comment appears as an inference drawn from those facts, any injustice that the imputation might occasion is practically negatived by

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[1] See George *v.* Goddard and Wisdom *v.* Brown, *supra.*

[2] Post Publishing Co. *v.* Hallam, 16 U. S. App. 613; Post Publishing Co. *v.* Maloney, 50 Oh. St. 71; Seely *v.* Blair, Wright (Oh.) 358, 683; Bronson *v.* Bruce, 59 Mich. 467; Dodds *v.* Henry, 9 Mass. 262; Sweeney *v.* Baker, 13 W. Va. 158; Campbell *v.* Spottiswoode, 3 B. & S. 769; Massie *v.* Toronto Printing Co., 11 Ont. R. 362; Brown *v.* Elder, 27 New Bruns. R. 465.

[3] In a general way, the majority of the American cases professing to discuss the subject of comment or criticism do not, as we shall see, involve any issue of that kind. The actual determination was simply that a defamatory statement of fact is not privileged merely by reason of the public interest of the subject matter. See cases cited in note 2 on page 432. In a few cases the decision is confined to this issue. Post Publishing Co. *v.* Hallam, 16 U. S. App. 613; Seely *v.* Blair, Wright (Oh.) 358, 683; Eviston *v.* Cramer, 57 Wis. 570; Spiering *v.* Andrae, 45 Wis. 330; Ullrich *v.* N. Y. Press Co., 23 N. Y. Misc. 168. But all these cases, as well as those hereafter cited, which turn upon the distinction between comment and statement of fact, including almost the whole course of English authority, reject the doctrine that there is any immunity in the publication of false statements of fact merely because the subject matter is of public interest.

reason of the fact that the reader has before him the grounds upon which the unfavorable inference is based. When the facts are truthfully stated, comment thereon, if unjust, will fall harmless, for the former furnish a ready antidote for the latter. The reader is then in a position to judge whether the critic has not by his unfairness or prejudice libelled himself [1] rather than the object of his animadversion. But if a bare statement is made in terms of a fact, or if facts and comment are so intermingled that it is not clear what purports to be inference and what is claimed to be fact, the reader will naturally assume that the injurious statements are based upon adequate grounds known to the writer. In one case, the insufficiency of the facts to support the inference will lead fair-minded men to reject it; in the other, there is little, if any, room for the supposition that the injurious statement is other than a direct change of the fact, based upon grounds known to the writer, although not disclosed by him.[2] The distinction

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[1] This happy expression is used in Popham *v.* Gilbert, 7 H. & N. 891, and Belknap *v.* Ball, 83 Mich. 583.

[2] See particularly, Davis *v.* Shepstone, 11 A. C. 187; Hunt *v.* Star Newspaper Co., [1908] 2 K. B. 309, per Fletcher-Moulton, L. J.; O'Brien *v.* Salisbury, 54 J. P. 215; Jenner *v.* A'Beckett, L. R. 7 Q. B. 11, *per* Lush, J.; R. *v.* Flowers, 44 J. P. 377; R. *v.* Carden, 5 Q. B. D. 1; South Hetton Coal Co. *v.* News Assn., [1894] 1 Q. B. 133; Christie *v.* Robertson, 10 New South Wales L. R. 161; Douglas *v.* Stephenson, 29 Ontario, 616.

"The distinction has been brought out more clearly in England than it has been in our own decisions." Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, *per* Holmes, C. J. See, however, Hubbard *v.* Allyn, 200 Mass. 166; Haynes *v.* Clinton Printing Co., 169 Mass. 512; Dow *v.* Long, 190 Mass. 138; Gatt *v.* Pulsifer, 122 Mass. 235; Triggs *v.* Sun Printing & Pub. Assn., 179 N. Y. 144; Howarth *v.* Barlow, 113 N. Y. App. Div. 510; McDonald *v.* Sun Printing & Pub. Assn., 45 N. Y. Misc. 441; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200; Hallam *v.* Post Publishing Co., 55 Fed. 456; Vance *v.* Louisville Courier Journal, 95 Ky. 41; Belknap *v.* Ball, 83 Mich. 583; Peoples *v.* Detroit Post Co., 54 Mich. 457; Pfister *v.* Milwaukee Free Press Co., 121 N. W. 938 (Wis.); Sweeney *v.* Baker, 13 W. Va. 158; Mertens *v.* Bee Publishing Co., 5 Neb. (Unofficial) 592; La Compagnie de Publication du Canada Revue *v.* Mgr. Fabre, Que. O. R. 6 S. C. 436.

It may be admitted, as asserted in Coleman *v.* MacLennan, 78 Kan. 711, that "expressions of opinion and judgment frequently have all the force of statements of fact, and pass by insensible gradations into declarations of fact." But, keeping in mind the fundamental principle referred to above, it does not follow that "the distinction between comment and statements of fact cannot always be clear to the mind."

There has been very little legislation on the subject. In Georgia, "comments upon the acts of public men, in their public capacity, and with reference thereto," and in Texas, "a reasonable and fair comment or criticism of the official acts of public officials, and of other matters of public concern published for general information,"

and its significance may be illustrated by an actual decision.[1] A publication advised voters to oppose a representative who was standing for reëlection, "because in the last legislature he championed measures opposed to the moral interests of the community." It appeared from the answer that what the writer had in mind when he wrote the article was the plaintiff's support of two legislative measures permitting sales of liquor on legal holidays and authorizing the removal of screens from saloons.

"The defense was made, first, that the statement was true; and, second, that if it cannot be said to be true, the proven acts were subject to criticism, and the defendants had the right to express their opinion as to their effect; in other words, that the language was privileged. The defendants had a right to discuss the fitness of the plaintiff for the office to which he aspired, and might lawfully communicate to the electors any facts within their knowledge concerning his character or conduct, and express their opinion upon them, and their inferences deduced from them, so long as they stated as facts only the truth, and as opinions and inferences therefrom only honest belief. The fault here, if there be one, is that opinions and inferences are not stated as such, but as facts. The defendants sought to justify the statement made . . . by proving that he supported the two measures. . . . It is evident that the acts proved were sufficient to induce in the minds of some the opinion [that the charge was true, and such persons were privileged to say so]. But admitting that they were privileged to express their

are declared to be privileged. Georgia Civil Code, sec. 2980, par. 6; Texas Laws of 1901, ch. 26, sec. 4. In the penal codes of New York and Minnesota it is provided that "the publication is excused when it is honestly made, in the belief of its truth and upon reasonable grounds for this belief, and consists of mere comments upon the conduct of a person in respect to public affairs or upon a thing which the proprietor thereof offers or explains to the public." New York Penal Code, sec. 244, par. 5; Minnesota Penal Code, sec. 6177. The provision of the Pennsylvania Constitution of 1874, art. 1, sec. 7, declaring that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of persons or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury," relates to criminal proceedings alone. Barr *v.* Moore, 87 Pa. St. 387; Briggs *v.* Garrett, 111 Pa. St. 404. The Texas Penal Code, Art. 630, provides that "it is no offense to make true statements of fact, or express opinions as to the integrity or other qualifications of a candidate for any office or public place or appointment.

In view of the fact that many of the state constitutional provisions concerning the freedom of the press refer only to the expression of "sentiments" or "opinions," the distinction between comment and statements of fact may one day involve constitutional questions of vital importance.

[1] Eickhoff *v.* Gilbert, 124 Mich. 353.

opinions concerning certain acts, was this what was done? Did they not go further and do more? They did not state what measures were supported, and their opinions of that particular conduct, but said generally and unqualifiedly, as a fact, that the plaintiff had arrayed himself against the moral interests of the community, which, if true, should discredit him with any voter who should believe the statement. It appealed alike to all classes, . . . [those who took that view, and those who thought otherwise], and it afforded no one an opportunity to judge whether the statement was a proper deduction from the facts upon which it was based or not. If one states that a candidate is a thief, without qualification, he communicates a fact pertaining to his fitness; but it is a slander, if untrue, whether made in good faith or not, although, had he stated the exact facts, and expressed the opinion that they amounted to stealing, though they did not technically constitute the offense of larceny, the comment might be privileged. The difficulty in this case is that the defendants have been permitted to limit their statement by proof of their intended meaning, while the writing itself contained no hint of limitation." [1]

It is to be observed, moreover, that although comment, however expressed, is opinion or inference, it may be stated in terms of a fact; and as such it is within the immunity of fair comment so long as it appears to be a permissible deduction or conclusion from other facts truly stated.[2]

Comment, criticism, or discussion [3] upon matters of public inter-

[1] A similar situation was presented, but not so clearly solved, in the well-known case of Littlejohn *v.* Greeley, 13 Abb. Pr. (N. Y.) 41, where the imputation was that the plaintiff "was prominent in the corrupt legislation of last winter," and the facts upon which the imputation was based did not appear in the article but were set forth in the answer. See also Crows Nest Pass Coal Co. *v.* Bell, 4 Ont. L. R. 660, and Champagne *v.* Beauchamp, 31 L. Can. J. 144. But see Lefroy *v.* Burnside, 4 L. R. Ir. 556, where the case was decided on other grounds on demurrer to a plea setting forth the facts upon which the inference was based.

[2] Lefroy *v.* Burnside, 4 L. R. Ir. 556; Hunt *v.* Star Newspaper Co., [1908] 2 K. B. 309, per Fletcher-Moulton, L. J.; O'Brien *v.* Salisbury, 54 J. P. 215; Cooper *v.* Lawson, 8 A. & E. 746; Speight *v.* Syme, 21 Vict. L. R. 672. An imputation of motive is a statement of fact. Davis *v.* Shepstone, 11 A. C. 187; Hunt *v.* Star Newspaper Co., *supra*.

[3] Comment is the generic term. Criticism has been most commonly used in connection with literary productions, but it has also been incorrectly used in this country for derogatory statements of fact. Since comment, in the law of defamation, implies derogatory comment, this term conveys the meaning attaching to criticism in ordinary parlance, and avoids the limitation and error resulting from the latter designation. Discussion is a term broad enough to include all the elements of comment — if, indeed, it is not subject to misconception as including both fact and comment, and thus including too much.

est being, therefore, an expression of opinion or judgment, and so incapable of definite proof, he who expresses it is not required by law to justify it as true, but is free to express it even though others dissent, provided his own expression is "fair," as the English cases invariably describe it. The constituent elements of the immunity are few and simple. In the first place, in order to give room for the plea of fair comment the facts commented upon must be truly stated.[1] This is little more than a restatement of the distinction upon which the immunity is based; the very statement of the doctrine assumes that the facts commented upon must be ascertained.

"The error which is usually committed by those who bring themselves within the law of libel when commenting on conduct is in thinking that they are commenting when in point of fact they are misdescribing. Real comment is merely the expression of opinion. Misdescription is matter of fact. If the misdescription is such an unfaithful representation of a person's conduct as to induce people to think that he had done something dishonorable, disgraceful, or contemptible, it is clearly libelous. To state accurately what a man has done, and then to say that in your opinion such conduct is disgraceful or dishonorable, is comment which may do no harm,

[1] In the following cases there was an absence or failure of proof of the facts upon which the comment purported to be based, and the plea of fair comment was therefore denied: Thomas *v.* Bradbury, Agnew & Co., [1906] 2 K. B. 627; Joynt *v.* Cycle Trade Publishing Co., [1904] 2 K. B. 292; South Hetton Coal Co. *v.* North Eastern News Assn., [1894] 1 Q. B. 133; Merivale *v.* Carson, 20 Q. B. D. 275; Davis *v.* Shepstone, 11 A. C. 187; R. *v.* Flowers, 44 J. P. 377; R. *v.* Carden, 5 Q. B. D. 1; Purcell *v.* Sowler, 2 C. P. D. 215; Risk Allah Bey *v.* Whitehurst, 18 L. T. 615; Harle *v.* Catherall, 14 L. T. 801; Hibbins *v.* Lee, 4 F. & F. 243; Morrison *v.* Belcher, 3 F. & F. 614; Campbell *v.* Spottiswoode, 3 B. & S. 769; Popham *v.* Pickburn, 7 H. & N. 891; Gathercole *v.* Miall, 15 M. & W. 319; Cooper *v.* Lawson, 8 A. & E. 746; Stuart *v.* Lovell, 2 Stark. 93; Tabart *v.* Tipper, 1 Camp. 350; Hubbard *v.* Allyn, 200 Mass. 166; Burt *v.* Advertiser Newspaper Co., 154 Mass. 238; Haynes *v.* Clinton Printing Co., 169 Mass. 512; Hay *v.* Reid, 85 Mich. 296; Belknap *v.* Ball, 83 Mich. 583; Foster *v.* Scripps, 39 Mich. 376; Scripps *v.* Foster, 41 Mich. 742; Martin *v.* Paine, 69 Minn. 482; Cooper *v.* Stone, 24 Wend. (N. Y.) 434; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200, 5 Sandf. (N. Y.) 54; Bee Publishing Co. *v.* Shields, 68 Neb. 750; Farley *v.* McBride, 103 N. W. 1036 (Neb.). See also the statement in Vance *v.* Louisville Courier Journal, 95 Ky. 41, and Howarth *v.* Barlow, 113 N. Y. App. Div. 510; Lefroy *v.* Burnside, 4 L. R. Ir. 556; Christie *v.* Robertson, 10 New South Wales L. R. 157; Browne *v.* M'Kinley, 12 Vict. L. R. 36, 240; Stewart *v.* McKinley, 11 Vict. L. R. 802 (where the proof was supplied by the plaintiff); Williams *v.* Spowers, 8 Vict. L. R. (L.) 82; Broadbent *v.* Small, 2 Vict. L. R. (L.) 121. Smiley *v.* McDougall, 10 Up. Can. Q. B. 113. The point is fully discussed in Hunt *v.* Star Newspaper Co., [1908] 2 K. B. 309; Walker *v.* Hodgson, [1909] 1 K. B. 239, and Digby *v.* Financial News, [1907] 1 K. B. 502.

as every one can judge for himself whether the opinion expressed is well founded or not. Misdescription of conduct, on the other hand, only leads to the one conclusion detrimental to the person whose conduct is misdescribed, and leaves the reader no opportunity for judging himself for the character of the conduct condemned, nothing but a false picture being presented for judgment." [1]

If it were permissible to invent facts, and then to comment on the facts so invented in what would be a fair manner on the supposition that the facts were true, any discussion of a matter of public interest might, through fanciful suggestions of all sorts of imaginary misconduct by way of pretended illustration, be made the vehicle of the most defamatory allegations without the slightest foundation.[2] But the law does not permit the absurdity of thus allowing a person to be libelled, and then commented upon.[3] If the facts upon which the comment purports to be made are not proved or admitted to be true, the foundation of the plea of fair comment fails.[4]

In the next place, the comment must be susceptible of being an inference or deduction from facts truly stated. That is to say, it must not introduce new and independent defamatory matter, or draw inferences or conclusions wholly irrelevant, or out of all proportion, to the given facts which supply the basis of the comment. And, above all, it must not attack the character or motives of the author of the thing criticized, whether that thing be public conduct or published work, except in so far as such private character or personal motives have of necessity, or by the act of the author, become part of the subject of public interest commented upon; it must not reflect upon him otherwise than as the author of, or the person responsible for, or concerned in, or connected with the particular conduct, work, or thing which constitutes the subject of the comment.[5] Next to mis-

[1] Christie *v.* Robertson, 10 New South Wales L. R. 157.

[2] Lefroy *v.* Burnside, 4 L. R. Ir. 556; Broadbent *v.* Small, 2 Vict. L. R. (L.) 121.

[3] R. *v.* Carden, 5 Q. B. D. 1, *per* Cockburn, C. J.

[4] In O'Brien *v.* Salisbury, 54 J. P. 215, it is said that comment may be "a deduction or conclusion come to by the speaker from other facts stated or referred to by him, or in the common knowledge of the person speaking and those to whom the words are addressed. For futher particulars concerning the justification of the facts upon which the comment is based see Speight *v.* Syme, 21 Vict. L. R. 672. "When one person alleges and another comments this reason does not apply, especially when the allegation, as distinct from the comment, is made in a privileged document." Mangena *v.* Wright, 100 L. T. 960.

[5] Bower, 117. "It is not because a public writer fancies that the conduct of a public

statement of facts, personal imputation is the principal cause of danger and disaster to criticism, and, as we shall see, it is the source of much of the confusion which exists in the statement of the law.

If comment conforms to the foregoing requirements the critic brings himself *primâ facie* within the immunity. But the occasion exists for a well-defined public purpose, and if the plaintiff can prove that the defendant, although *primâ facie* within the immunity, was nevertheless using the occasion for some ulterior and improper purpose, he thereby displaces the immunity, and the defendant is liable, just as he would have been if he had never brought himself within the right.[1] Having regard to the reasons for which the occasion exists, the most obvious proof for this purpose would be circumstances tending to show that the opinion expressed in the comment was not the defendant's genuine opinion;[2] or that he had no opinion at all on the

man is open to suspicion of dishonesty, he is therefore justified in assailing his character as dishonest." Campbell *v.* Spottiswoode, 3 B. & S. 769, *per* Cockburn, C. J. In Lefroy *v.* Burnside, 4 L. R. Ir. 556, it was held on demurrer that the fact that a man had the means of committing a crime, and the crime being in fact committed, would not warrant the inference that he who had the means was the criminal. The same point is involved in cases which hold that it is not fair comment to assume that a person accused of crime is guilty. Haynes *v.* Clinton Printing Co., 169 Mass. 512; Commercial Publishing Co. *v.* Smith, 149 Fed. 704. The following cases illustrate the general rule from various points of view: Joynt *v.* Cycle Trade Pub. Co., [1904] 2 K. B. 292; Hunt *v.* Star Newspaper Co., [1908] 2 K. B. 309; Dakhyl *v.* Labouchere, [1908] 2 K. B. 325, n.; R. *v.* Calthorpe, 27 J. P. 581; Cooper *v.* Lawson, 8 A. & E. 746; Speight *v.* Syme, 21 Vict. L. R. 672; Browne *v.* M'Kinley, 12 Vict. L. R. 36, 240; Broadbent *v.* Small, 2 Vict. L. R. (L.) 121; Christie *v.* Robertson, 10 New South Wales L. R. 161; Reade *v.* Sweetzer, 6 Abb. Pr. N. S. (N. Y.) 79, n.; Edsall *v.* Brooks, 17 Abb. Pr. 21; Farley *v.* McBride, 74 Neb. 49; Wilcox *v.* Moore, 69 Minn. 49; Scripps *v.* Foster, 41 Mich. 742; Neeb *v.* Hope, 111 Pa. 145.

[1] That the *primâ facie* protection accorded to fair comment, is, as in the analogous case of fair reports (Stevens *v.* Sampson, 5 Ex. D. 53), liable to be displaced by malice, is settled by the judgment of the Court of Appeal in Thomas *v.* Bradbury, Agnew, & Co., [1906] 2 K. B. 627. Comment is therefore as much a species of conditional immunity as any of the communications usually described as qualifiedly privileged. "If the analysis be strictly carried out it will be found that the two rights, whatever name they are called by, are governed by the same rules." The contrary view involves the assertion that comment is absolute and wholly outside the ordinary law of libel. Thomas *v.* Bradbury, *supra;* Henwood *v.* Harrison, L. R. 7 C. P. 606, *per* Willes, J.; McQuire *v.* Western Morning News, [1903] 2 K. B. 100. For statements of that view see Campbell *v.* Spottiswoode, 3 B. & S. 769, per Blackburn and Crompton, JJ.; Merivale *v.* Carson, 20 Q. B. D. 275.

[2] According to the well-established rule with respect to privileged publications there is no immunity in the publication of statements not believed to be true, or known to be false; so in the case of fair comment the absence of any genuine belief in the justice of the comment is conclusive proof of malice, for no one can have a proper motive

subject of the comment, or otherwise published it without any belief that it was just, and in reckless indifference as to whether it was just or unjust.[1] If, however, such honest belief in the justice of the comment existed in fact, it is wholly immaterial whether, in an intellectual sense, it was sound or unsound, convincing or irrational,[2] unless it can be proved by independent evidence that such belief, though genuinely entertained, was itself created by malice.[3]

It is obvious, therefore, that the term "fair," as used in the English cases, merely excludes those elements which prevent the comment from falling within, or take it out of, the immunity arising from the occasion.[4] But in so far as facts are assumed as the basis of the criticism, or untrue allegations of fact are introduced in the course of it, or personal imputations are made not arising out of it, the pretended criticism is not criticism at all. It is not a question of its title to the epithet "fair," or to any other epithet; it does not answer to the description of comment, and is defamation pure and simple. Where, on the other hand, it is proved by the plaintiff that the comment, though on the face of it answering to the description, was nevertheless the ex-

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for making comments which he does not believe to be warranted. See Thomas *v.* Bradbury, *supra*. The malice which actuates comment need not necessarily be directed against the plaintiff. Stuart *v.* McKinley, 11 Vict. L. R. 802.

[1] Morrison *v.* Belcher, 3 F. & F. 614; Hedley *v.* Barlow, 4 F. & F. 224; Risk Allah Bey *v.* Whitehurst, 18 L. T. 615.

[2] "Belief is none the less belief because it is unreasonable. The immunity which the law confers in the first instance on certain kinds of publication in certain circumstances is not displayed by proof of the defendant's folly or stupidity, but only by proof of his bad faith. Unless the protection extends to the blunderer as well as to the sensible person, it is no protection at all. The law is the same in the analogous class of actions known as deceit, where to prove that the defendant made the incriminated statement on insufficient grounds is no proof of fraud, and in actions for malicious prosecution, where the absence of reasonable and probable cause is a distinct element from, and not the same thing in other words as, malice. But, just as in actions of deceit the unreasonableness of the belief, if it existed, may be so glaring that a jury is justified in inferring that the alleged belief could never in fact have existed, and, as in actions for malicious prosecution, the irrationality and carelessness of the charge, if made in good faith, may be of such an extraordinary nature as to justify a jury in inferring that the good faith could never have existed; so, in actions of defamation, the jury are warranted in imputing a certain minimum of intelligence to the defendant, and are at liberty to reject the contention that he believed what he professed to believe from sheer irrationality, and adopt the other hypothesis that he did not believe it at all." Bower, 165 (f); Clark *v.* Molyneux, 3 Q. B. D. 237; McQuire *v.* Western Morning News, [1903] 2 K. B. 100.

[3] Wason *v.* Walter, L. R. 4 Q. B. 73.

[4] McQuire *v.* Western Morning News, [1903] 2 K. B. 100.

pression of an opinion which the critic did not in fact entertain or was otherwise actuated by malice, it is sufficient to say that the protection is lost; there is no occasion to speak of fairness or unfairness. Everything that is involved in the rule prescribing fairness, would equally be contained in any rule which, omitting the term altogether, simply prescribed that the publication of any defamatory matter which is wholly and solely comment on the public conduct or published work of another is the subject of an immunity defeasible only on proof of malice. It is clear that what is meant by "fairness" is neither more nor less than the absence of malice,[1] and the burden being on the plaintiff to allege and prove the existence of malice, as well as the fact that it prompted the comment, and not on the defendant to allege and prove its absence, or to negative any suggestion that his comment was actuated thereby, the use of a positive word in connection with comment is seen to be not only unnecessary, but most deceptive, inasmuch as it imports the necessary presence of an affirmative quality as the condition of immunity, whereas it is the existence and influence of its opposite which is the necessary condition of that immunity being displaced.[2]

On a plea of fair comment the burden is on the defendant to prove all the facts necessary to bring the case within the foregoing requirements. He must satisfy the court that the subject of the comment is a matter of public importance, and must establish that the matter, on its face, is comment, unadulterated with any of those alien elements which are sufficient to prevent its coming within the province of fair comment.[3] If the plaintiff desires to show that the *primâ facie* immunity, innocent as it appears to be on the surface, was in fact actuated by malice, the burden is on him to prove this.[4] Whether the subject is one of public interest,[5] and whether there is any evidence of the defamatory matter constituting or not constituting fair comment,[6] are

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[1] "The word 'fair' is used with reference to malice." Hedley *v.* Barlow, 4 F. & F. 224, *per* Cockburn, C. J.

[2] Bower, 119, 388–390. Mr. Bower's discussions of the terminology of the law of defamation are of the highest value.

[3] Walker *v.* Hodgson, [1909] 1 K. B. 239, *per* Vaughan-Williams, L. J.

[4] McQuire *v.* Western Morning News, [1903] 2 K. B. 100.

[5] Dakhyl *v.* Labouchere, [1908] 2 K. B. 325, n.

[6] Dakhyl *v.* Labouchere, [1908] 2 K. B. 325, n., per Lord Atkinson; Henwood *v.* Harrison, L. R. 7 C. P. 606, *per* Willes, J.; South Hetton Coal Co. *v.* N. E. News Assn., [1894] 1 Q. B. 133, *per* Lopes, L. J.; McQuire *v.* Western Morning News, [1903] 2 K. B. 100; O'Brien *v.* Salisbury, 54 J. P. 215; Cooper *v.* Lawson, 8 A. & E. 746; McBee *v.* Fulton, 47 Md. 403.

questions of law.[1] All other issues in relation to a plea of fair comment are questions of fact.[2]

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[1] There are, therefore, two distinct checks upon the action of a jury in the case of fair comment. They are not at liberty to find for the plaintiff because they think that the matter was not of public interest, nor are they at liberty to find for the plaintiff on the ground that the comment is unfair unless the court is first satisfied that there is sufficient evidence of unfairness to justify such a finding.

[2] If the principles upon which the doctrine of fair comment rests are of general application, it is plain that the question to be decided is, not whether the inference seems sound to the jury, but whether it could honestly seem so to the defendant. But there has been a marked tendency on the part of judges to avoid the purely negative aspect of the term "fair," and to make a distinction in kind, rather than in degree, between literary criticism and comment on public acts. In the case of literary criticism it has been made plain that juries have no right to substitute their own opinion for that of the critic. McQuire *v.* Western Morning News, [1903] 2 K. B. 100; Merivale *v.* Carson, 20 Q. B. D. 275. With respect to personal imputations, the modern cases quite generally rely upon the statement made by Cockburn, C. J., in Campbell *v.* Spottiswoode, 3 B. & S. 769; "I think the fair position in which the law may be settled is this: that where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." This distinguished judge explained and amplified this statement in several succeeding cases. R. *v.* Calthorpe, 27 J. P. 581; Morrison *v.* Belcher, 3 F. & F. 614; Hedley *v.* Barlow, 4 F. & F. 224; Woodgate *v.* Rideout, 4 F. & F. 202; Hunter *v.* Sharp, 4 F. & F. 983; Risk Allah Bey *v.* Whitehurst, 18 L. T. 615, and Wason *v.* Walter, L. R. 4 Q. B. 93. But only in Morrison *v.* Belcher did he state the doctrine in unequivocal terms: "The law laid down by the court . . . in Campbell *v.* Spottiswoode . . . was this: It was not because a public writer might not be able to prove to the letter all he had stated that, therefore, he was liable; but the jury must be of opinion that his observations and inferences were fair and legitimate under the circumstances; or [rather?] that they were not so unfair as to be reckless, and thus, in law, malicious." The confusion appears in the recent case of Hunt *v.* Star Newspaper Co., [1908] 2 K. B. 309, where the Court of Appeal reversed a judgment because the trial judge had charged the jury in a manner which seemed to imply that that could not be fair comment which imputed improper conduct. The three judges constituting the court expressed the rule in different ways. According to Cozens-Hardy, M. R., the question was whether the comment "was fair and such as might, in the opinion of the jury, be reasonably made." As stated by Buckley, L. J., it was whether the comment "was in their opinion beyond that which a fair man, however extreme might be his views in the matter, might make honestly and without malice, and which was not without foundation. . . . Whether the criticism be upon a literary production or the conduct of a public man, it is for the jury, I think, to find whether the imputation based upon facts truly stated does not honestly represent the opinion of the person who gives expression to it, and was not without foundation." Fletcher-Moulton, L. J., "thoroughly disagreed" with the argument "based mainly upon an application of the language of the judgment in Merivale *v.* Carson to the case of the imputation of corrupt or disgraceful motives to an individual, and the contention . . . that if, in his comment on facts, a writer attributed such motives to an individual, such comment was covered by a plea of fair comment

The foregoing states the force and effect of English law according to modern authority. At the same time, it must be admitted that it is not in entire accord with earlier cases, nor are the modern authorities in entire agreement; and it would be idle to say that the subject is free from difficulty. The divergence of opinion and the difficulty occur at the point where certainty is most needed — where imputations of motive are made. So far as the imputation of motives is concerned, it is obvious that the early cases of literary criticism furnished a misleading precedent. In the field of literary and artistic criticism, where the expression of thought and imagination, and not the manifestation of will and character in action, is the subject of public interest, and where, therefore, there is hardly ever any necessity for dealing with personality at all, it is of course much easier to draw the line of demarcation between what is and what is not "fair." Although in the early history of literature it was customary to discuss the personality of authors as freely as their books, it is now recognized that such a course can rarely be necessary or permissible. As regards acts and conduct, on the other hand, criticism is often necessarily personal. It is quite possible, in most cases, that the critic should only criticize the person indirectly in connection with the thing, and that whilst possibly denouncing the tendency, effect, or policy of a course of conduct, he should leave the motives and intention and character of the individual severely alone.[1] But on some occasions it must be recognized that the individual has submitted the latter to

unless the views it expressed could not be held by any fair man, however prejudiced he might be, and however exaggerated and obstinate his views. . . . The law laid down by the decision in that case has . . . nothing to do with personal libels, such as the imputation of disgraceful motives to an individual. . . . Comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation. . . . In other words, a libelous imputation is not warranted by the fact unless the jury hold that it is a conclusion which ought to be drawn from those facts. Any other interpretation would amount to saying that, where facts were only sufficient to raise a suspicion of criminal or disgraceful motive, a writer might allege such motive as a fact and protect himself under the plea of fair comment. No such latitude is allowed by English law. To allege a criminal intention or a disgraceful motive as actuating an individual is to make an allegation of fact which must be supported by adequate evidence." Compare, also, Joynt *v.* Cycle Trade Publishing Co., [1904] 2 K. B. 292, with Walker *v.* Hodgson, [1909] 1 K. B. 239.

[1] For illustrations of the border line between impersonal and personal criticism, see Paris *v.* Levy, 9 C. B. N. S. 342; Turnbull *v.* Bird, 2 F. & F. 508; O'Brien *v.* Salisbury, 54 J. P. 215; Campbell *v.* Spottiswoode, 3 F. & F. 421; Reade *v.* Sweetzer, 6 Abb. Pr. N. S. 79, n.; Boal *v.* Scottish Catholic Printing Co. (1907), Scotch Ct. Sess. Cas. 1120. See Bower, App. XII, sec. 5.

public discussion. A candidate for an office of public trust, for instance, necessarily puts his personal character in issue so far as it pertains to his qualifications for the office he seeks. While this view has not met with universal acceptance, it seems clear that the fundamental error of any other doctrine consists in the assumption that the private character of a public officer is something aside from, and not entering into or influencing, his public conduct; that a thoroughly dishonest person may be a just administrator, and that a judge who is corrupt and debauched in other relations of life may still be pure and upright in his judgments; in other words, that an evil tree is as likely as any other to bring forth good fruit.

"Any such assumption is false to human nature, and contrary to general experience; and whatever the law may say, the general public will still assume that a corrupt life will influence public conduct, and that a man who deals dishonestly with his fellows as individuals will not hesitate to defraud them in their aggregate and corporate capacity, if the opportunity shall be given him. They are therefore interested in knowing what is the character of their public servants, and what sort of persons are offering themselves for their suffrages. And if this be so, it would seem that there should be some privilege of comment; that that privilege could only be limited by good faith and just intention; and that of these it was the province of the jury to judge, in view of the nature of the charges made, and the reasons which existed for making them." [1]

In early English cases involving literary criticism it was asserted in broad terms that no personal imputation was permissible, and this precedent was occasionally followed in similar terms in cases of comment on public acts and conduct. But the foundation of the modern law on this, as on so many other details of the general sub-

[1] Cooley, Const. Lim. 440. See also Bruce *v.* Leisk, 19 R. 482 (Sc.), where, in protecting an elector who had falsely charged a candidate in a municipal election with having been bankrupt, and that it was a dishonest and disreputable failure, and that the pursuer was in consequence an unsuitable person to represent the electors, Lord President Robertson said: "It may well be said that a man who has been bankrupt once may become bankrupt again; at all events, that if a person who has not been bankrupt were standing, he was more eligible than a person who had been. It may be said, also, that the facts indicate a want of success in business not encouraging to electors asked to entrust a man with their business; and when we come to the most invidious part of the statement — that it was a dishonest and disreputable failure — that would seem to be highly relevant to the question whether, the office vacant being an office of trust and high public responsibility, the choice of the electors would fitly fall upon a person who had gone through these vicissitudes."

ject, is to be found in the decisions of Chief Justice Cockburn, from 1862. It had been held as late as 1840, by the Court of Exchequer,[1] that though some words which are clearly libelous of a private person may not amount to a libel when written of a person in a public capacity, still, any imputation of unjust or corrupt motives is equally libelous in either case. Six years later the same court perceived a distinction between comments on a man's public and his private conduct, but confessed that it could "hardly tell what the limits of it are."[2] In his first judicial utterance on the subject, however, Chief Justice Cockburn stated the true doctrine in unimpeachable terms.

"He differed from the learned counsel for the plaintiff when it was contended that under no circumstances could private conduct form a proper subject of observation for a public writer. Mr. Seymour did not occupy the position of a private individual, nor was it as a private individual that his conduct was made the matter of inquiry. . . . Under these circumstances it was impossible to say that he was not a public man, and that his conduct, if it had reference to his fitness to be a public man and to occupy a public position, was not a fair subject of debate. Mr. Seymour held a position in which integrity, honesty, and honor were essential, and if in his private conduct he showed himself destitute and devoid of those essential qualities, surely it could not be said that it was not a fair matter for public animadversion, so long as the writer kept within the bounds of truth and the limits of just criticism."[3]

Whatever uncertainty may characterize some of the intervening cases, it is now established by recent English cases that "a personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts; in other words, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried; but if he should

[1] Parmiter *v.* Coupland, 6 M. & W. 105, *per* Parke, B.

[2] Gathercole *v.* Miall, 15 M. & W. 319, *per* Alderson, B.

[3] Seymour *v.* Butterworth, 3 F. & F. 614. In Campbell *v.* Spottiswoode, 3 B. & S. 769, the same judge stated the law to be that "where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintainable." And in Wason *v.* Walter, L. R. 4 Q. B. 93, he referred to the fact that "the full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized."

rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn." [1]

In this country the weight of judicial *dicta* is undeniable contrary to the English view. In the majority of the cases commonly cited in this connection no distinction between comment and statement of fact is made or involved in the actual determination. They are, almost without exception, cases involving direct statement as distinguished from comment; or, if involving any comment at all, no basis for the comment was proved, and privilege was claimed simply by virtue of the occasion being a matter of public interest.[2] These cases are not, therefore, in opposition to the English rule, for they were not cases of comment properly so called, and privilege would have been equally denied under that rule. They are simply authority for the rule that a direct statement of fact is not privileged by reason of the publicity of the occasion.[3] The difficulty is that these decisions have generally gone beyond the actual issue, and, often using the term "criticism" as synonymous with derogatory statements of fact, have expressed the *dictum* that criticism is privileged, or not actionable, so long as it does not attack the private character of the person criticized, or impute evil motives. In other words, while the actual decision is generally unimpeachable, the foundation is delusive, *i. e.*, a distinction between different kinds of imputation, whereas the true distinc-

[1] Dakhyl *v.* Labouchere, [1908] 2 K. B. 325, n., *per* Lord Atkinson; Hunt *v.* Star Newspaper Co., [1908] 2 K. B. 309; Joynt *v.* Cycle Trade Publishing Co., [1904] 2 K. B. 292; Walker *v.* Hodgson, [1909] 1 K. B. 239; Odger *v.* Mortimer, 28 L. T. 472; Hunter *v.* Sharp, 4 F. & F. 983; De Mestre *v.* Syme, 9 Vict. L. R. (L.) 10.

[2] In addition to the cases cited in note 1, on page 433, see Murray *v.* Galbraith, 109 S. W. 1011 (Ark.); Martin *v.* Paine, 69 Minn. 482; Austin *v.* Hyndman, 119 Mich. 615; Owen *v.* Dewey, 107 Mich. 67; Hay *v.* Reid, 85 Mich. 296; Belknap *v.* Ball, 83 Mich. 583; McAllister *v.* Free Press Co., 76 Mich. 338; Wheaton *v.* Beecher, 66 Mich. 307; Baurreseau *v.* Evening Journal Co., 63 Mich. 425; Bronson *v.* Bruce, 59 Mich. 467; Peoples *v.* Detroit Post, 54 Mich. 457; Scripps *v.* Foster, 41 Mich. 742; Foster *v.* Scripps, 39 Mich. 376; Farley *v.* McBride, 74 Neb. 49; Bee Pub. Co. *v.* Shields, 68 Neb. 750; Mattice *v.* Wilcox, 147 N. Y. 624; Hamilton *v.* Eno, 81 N. Y. 116; Fry *v.* Bennett, 3 Bosw. 200, 5 Sandf. 54; Cooper *v.* Stone, 24 Wend. 434; Lewis *v.* Few, 5 Johns. 1; Littlejohn *v.* Greeley, 13 Abb. Pr. 41; San Antonio Light Pub. Co. *v.* Lewy, 113 S. W. 574 (Tex.); Post Publishing Co. *v.* Hallam, 16 U. S. App. 613; Eviston *v.* Cramer, 57 Wis. 570; Spiering *v.* Andrae, 45 Wis. 330; Wofford *v.* Meeks, 129 Ala. 349. See also Munro *v.* Quigley, 30 Nov. Sco. R. 360.

[3] And some of them stop there. See Post Publishing Co. *v.* Hallam, 16 U. S. App. 613, and other cases cited in note 3 on page 419.

tion is between comment and statement of fact.[1] While this doctrine recognizes some latitude in the discussion of matters of public interest, its practical futility is shown by the conflicting and sometimes fanciful ideas of the sort of imputations which are held to fall within it.[2] But

[1] The leading cases are Dauphiny *v.* Buhne, 96 Pac. 880 (Cal.); Star Publishing Co. *v.* Donahoe, 58 Atl. 513 (Del.); Jones *v.* Townsend, 21 Fla. 431; Negley *v.* Farrow, 60 Md. 158; Hamilton *v.* Eno, 81 N. Y. 116; Upton *v.* Hume, 24 Ore. 420; Banner Pub. Co. *v.* State, 16 Lea (Tenn.) 176; Smith *v.* Tribune Co., 4 Biss. (U. S.) 477; Russell *v.* Washington Post, 31 App. D. C. 277; Sweeney *v.* Baker, 13 W. Va. 158. This view is also taken in Tanner *v.* Embree, 99 Pac. 547 (Cal.); Jarman *v.* Rea, 137 Cal. 339; People *v.* Fuller, 238 Ill. 116; Rearick *v.* Wilcox, 81 Ill. 77; Luzenberg *v.* O'Malley, 116 La. 699; Fitzpatrick *v.* Daily Star Pub. Co., 48 La. 1116; Bearce *v.* Bass, 88 Me. 521; Wheaton *v.* Beecher, 66 Mich. 307; Bronson *v.* Bruce, 59 Mich. 467; Smith *v.* Burrus, 106 Mo. 94; Post Publishing Co. *v.* Maloney, 50 Oh. St. 71; Todd *v.* Publishing Co., 29 Oh. Cir. Ct. Rep. 155; Mayrant *v.* Richardson, 1 Nott & McCord (S. C.) 347; Brewer *v.* Weakley, 2 Overton (Tenn.) 176; Forke *v.* Homann, 14 Tex. Civ. App. 670; McDonald *v.* Woodruff, 2 Dillon (U. S.) 244. Many of the Pennsylvania cases seem to take practically the same view. Wallace *v.* Jameson, 179 Pa. 98; Wood *v.* Boyle, 177 Pa. 620; Conroy *v.* Pittsburgh Times, 139 Pa. 334; Neeb *v.* Hope, 111 Pa. 145; Barr *v.* Moore, 87 Pa. 387; Pittock *v.* O'Neill, 63 Pa. 253. See also Edwards *v.* San José, etc. Co., 99 Cal. 431; Clifton *v.* Lange, 108 Ia. 472; Cotulla *v.* Kerr, 74 Tex. 89; Byrne *v.* Funk, 38 Wash. 506; Com. *v.* Wardwell, 136 Mass. 164; Lent *v.* Underhill, 54 N. Y. App. Div. 609; Benton *v.* State, 59 N. J. L. 551.

[2] In Negley *v.* Farrow, 60 Md. 158, it is asserted that "there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives by which that conduct may be supposed to be governed." In Sweeney *v.* Baker, 13 W. Va. 158, the distinction is said to be between the acts and conduct of a candidate for office and his moral character. The usual distinction is between public acts and private character, and a favorite quotation is a passage from Post Pub. Co. *v.* Maloney, 50 Oh. St. 71, to the effect that "a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property." The fitness and qualifications of a candidate, as shown by his acts and conduct, are commonly admitted to be subject to comment and criticism, but not such as impute moral delinquency. Jones *v.* Townsend, 21 Fla. 431; Upton *v.* Hume, 24 Ore. 420. "A person cannot be untruthful, profane, or a libertine in his official capacity. These are attributes of his moral character as a man, not as an officer, although they may render him unfit to hold the office." Com. *v.* Wardwell, 136 Mass. 164. "It is true that when a person becomes a candidate for a public office, his talents and qualifications for the office to which he aspires may be fully commented on and criticized by any member of the community, by publication or otherwise. His faults and his vices, in so far as they may affect his official character, may be freely discussed. He does not, however, by becoming a candidate, surrender his private character as a subject for false accusation. That character is only put in issue as far as his fitness or qualification for the office he seeks may be affected by it." Dauphiny *v.* Buhne, 96 Pac. 880 (Cal.). And yet in this case the imputation was official corruption. The contradiction is as flat in Tanner *v.* Embree, 99 Pac. 547 (Cal.), Forke *v.* Homann, 14 Tex. Civ. App. 670, and Wheaton *v.* Beecher, 66 Mich. 307. In Sweeney *v.* Baker, 13 W. Va. 158, the court solemnly for-

this doctrine, so far as it is intelligible, would seem to leave little, if any, more practical freedom in the discussion of matters of public interest than that which is permitted in the discussion of the conduct of a private person. It leaves the law very much in the attitude of saying, "You have full liberty of discussion, provided, however, you say nothing that counts."

Other and more carefully considered cases are in substantial agreement with the prevailing English doctrine.[1] Perhaps the general course of the development of the law in this country may be best indicated by reference to the New York cases. The earliest case[2] on the general subject arose, in 1809, out of an address issued by opponents of the reëlection of Morgan Lewis as governor of the state, charging him, among other things, with political apostasy, family aggrandizement in his appointments, signing the charter of a bank after notice that it had been procured by fraudulent practices, publishing doctrines unworthy of a chief magistrate, attempting to destroy the liberty of the press by vexatious prosecutions, etc. The defendant demurred to the plaintiffs evidence, claiming a constitutional privilege arising out of the occasion of the publication. The demurrer was very properly overruled, but the court said:

"That electors should have a right to assemble and freely and openly to examine the fitness and qualifications of candidates for public offices, and communicate their opinions to others, is a position to which I most cordially accede. But there is a wide difference between this privilege and a right irresponsibly to charge a candidate with direct and unfounded crimes. . . . Candidates have rights, as well as electors; and those rights and privileges must be so guarded and protected as to harmonize one with the other. . . . All that is required, in the one case or the other, is, not to transcend the bounds of truth. If a man has committed a crime, any one has a right to

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mulates the rule that comment must be confined to mental and physical qualifications. As a whole, these statements are about as luminous as the oracular utterance of the Supreme Court of Missouri in Smith *v.* Burrus, 106 Mo. 94: "Within the bounds of legitimate discussion, all that is necessary to say and proper to say respecting the actions and qualifications of candidates or public officers, may legitimately be said."

[1] Howarth *v.* Barlow, 113 N. Y. App. Div. 510; McDonald *v.* Sun Printing & Pub. Co., 45 N. Y. Misc. 441; Reade *v.* Sweetzer, 6 Abb. Pr. N. S. 79, n.; Hart *v.* Townsend, 67 How. Pr. 88; Eickhoff *v.* Gilbert, 124 Mich. 353; Dunneback *v.* Tribune Printing Co., 108 Mich. 75; Belknap *v.* Ball, 83 Mich. 583; McBee *v.* Fulton, 47 Md. 403; Smith *v.* Higgins, 16 Gray (Mass.) 251; Burt *v.* Advertiser Newspaper Co., 154 Mass. 238; Mertens *v.* Bee Pub. Co., 5 Neb. (Unofficial) 592.

[2] Lewis *v.* Few, 5 Johns. 1.

charge him with it, and is not responsible for the accusation; and can any one wish for more latitude than this?"

This view was presented in a still stronger light twenty years later in a case[1] where a newspaper opposing the reëlection of the lieutenant-governor of the state, charged him with being intoxicated while presiding in the senate chamber, giving in detail the circumstances on which the opinion was based. The publishers justified the charge as true, and produced witnesses, who had been present on the occasion in question, who testified that the statement was true. There was therefore good reason for supposing that the charge was made in the belief that it was true, and if it was true, there was abundant reason on public grounds for making the statement. But the jury, having been told that the only privilege the defendants had was "simply to publish the truth, and nothing more," found the preponderance of the evidence against the truth of the charge. In the Court of Errors and Appeals, where judgment for the plaintiffs was sustained, Walworth, C., said in reply to the defendants' claim of privilege:

"If so, the defendants were under no obligation to prove the truth of the charge; and the party libelled had no right to recover unless he established malice in fact, or showed that the editors knew the charge to be false. The effect of such a doctrine would be deplorable. Instead of protecting, it would destroy the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office without being answerable for the truth of such publication. No honest man could afford to be an editor; and no man, who had any character to lose, would be a candidate for office. . . . The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding themselves responsible for the truth of what they publish."[2]

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[1] King *v.* Root, 7 Cow. 613, 4 Wend. 113.

[2] Compare this with Davis *v.* Duncan, L. R. 9 C. P. 396, where a similar imputation was sustained as fair comment. In Coleman *v.* MacLennan, 78 Kan. 711, the following allusion is made to this case: "What is a charge of intoxication — an inference from conduct and appearances and therefore fair comment, or the statement of a fact? What is the difference between the charge of intoxication and the following: 'Having appearances which were certainly consistent with the belief that they had imbibed rather freely of the cup that inebriates. Their condition in the chapel also led one to such a conclusion'? In England this statement is fair comment. Davis *v.* Duncan, L. R. 9 C. P. 396. In New York, no matter how strongly appearances and conduct may justify the inference, a charge of intoxication made against a public official must

In these two cases no privilege of discussion whatever, as springing from the relation of elector and candidate, is conceded in a civil action;[1] they are treated precisely as they would have been if no public consideration were in any way involved. It is difficult to understand how the privileges of electors, of which they speak, are protected by such a doctrine. These decisions treat the subject as if there were no middle ground between absolute immunity for falsehood and the application of the same strict rules which prevail in other cases.[2]

This narrow view of the law was not maintained. In Hamilton *v.* Eno,[3] although the earlier cases were not overruled, the matter is put upon entirely different grounds, apparently without any real appreciation of the departure. In this case it appeared that an assistant inspector of the board of health of the city of New York had made an official report recommending a certain kind of street pavement. The defendant thereupon published a statement asserting in effect that the statements in the report had been dictated by persons financially interested in the pavement, and that the inspector had received a reward from them for it. The defendant offered no proof of the charge, but claimed that, although it was defamatory and untrue, yet, if made without malice, it was privileged.

The court conceded that, "in a qualified way, the [privileged] occasion exists when there has been put forth a publication of general public interest, or the publication thus made in itself is one to which public interest has been invited. Then there is a right to make comment upon that publication. And like to this are the acts and conduct of public functionaries, and, of course, their official productions, when made public by themselves or in the due course of the public business. . . . Every citizen had a right to discuss the question as publicly as the report had done so. So that the time and mode of the publication of the defendant made the occasion of it thus far

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be fully proved. King *v.* Root, 4 Wend. 113." The answer to this inquiry is obvious. In both cases there was an imputation of intoxication as an inference from facts stated; but in one case the inference was protected as fair comment, while in the other it was held necessary to justify the inference as a fact.

[1] In Com. *v.* Clap, 4 Mass. 163, Chief Justice Parsons had, in 1809, admitted that, in criminal cases, a defendant who could prove the truth of his charges might be protected in some cases where he would not be if the person assailed was not appealing to public favor.

[2] See Cooley, Constitutional Limitations, 431 *et seq.*; Eickhoff *v.* Gilbert, 124 Mich. 353; Express Co. *v.* Copeland, 64 Tex. 354.

[3] 81 N. Y. 116 (1880).

privileged. Such an occasion must, however, be used fairly and in good faith, with a view to the public interest and good, and without evil or malicious motive. In the case at hand, there was the report of the plaintiff, and it was his report made officially. It was, therefore, the subject of criticism as a work upon a matter of public interest, and also as the act of an official person. As a work, the defendant might question its statements of fact and deny them, he might expose misrepresentations and point out errors; he might combat its reasoning and show its conclusions ill drawn; and he might do so with satire and ridicule, so long as he directed those missiles at the report and the contents of it. But he could not attack the private character of the author; to do so would be libellous. (Cooper *v.* Stone, 24 Wend. 442.) . . . We are of the opinion that the official act of a public functionary may be freely criticized, and entire freedom of expression used in argument, sarcasm, and ridicule upon the act itself; and that then the occasion will excuse everything but actual malice and evil purpose in the critic. We are of the opinion that the occasion will not of itself excuse an aspersive attack upon the character and motives of the officer; and that to be excused, the critic must show the truth of what is uttered of that kind."

More guardedly worded is the judgment in Mattice *v.* Wilcox,[1] in which it appeared that, prior to a charter election for trustees of a village, the defendant published a circular dealing with general village topics, in the course of which he imputed to the plaintiff criminality in his office of assessor, and incompetence in his professional capacity as attorney for the village. In denying the defendant's broad claim of privilege, the court said:

"The defendant had the right at all times to communicate publicly by speech, or in writing, with the citizens of Oneonta regarding the general condition of municipal affairs. The approaching election for trustees was a peculiarly appropriate occasion for it. But the occasion did not excuse the defendant in making a personal and defamatory charge against the character of the plaintiff, nor was such a charge privileged within the meaning of the term as already defined. (Hamilton *v.* Eno, 61 N. Y. 116.) The defendant could not thus attack in an aspersive manner the private or professional character of the plaintiff; certainly not unless there were some fair or plausible reason for thus including and attacking it in the course of proper and appropriate criticism concerning the manner in which the affairs of the village had been conducted. We do not think the proof or the circumstances show there was any such reason; nor can it fairly or appropri-

[1] 147 N. Y. 624 (1895).

ately be founded upon any or all of the facts proved by the defendant. If an individual choose to attack an officer and charge him with incompetency in his professional character and with criminality in his office as assessor (if the jury should so construe his language), he must be prepared, when brought into court, to prove the truth of his charge."

In Triggs *v.* Sun Printing & Pub. Assn.,[1] in overruling a demurrer to the complaint in a case where an author had been represented as a presumptuous literary freak, and his private life ridiculed, the court advanced a step further:

"It is contended by the respondent that the articles published were a mere comment or criticism of matters of public interest and concern, and, hence, were privileged. While every one has a right to comment on matters of public interest, so long as one does so fairly, with an honest purpose, and not intemperately and maliciously, although the publication is made to the general public by means of a newspaper, yet, what is privileged is criticism, not other defamatory statements, and if a person takes upon himself to allege facts otherwise actionable, he will not be privileged, however honest his motives, if those allegations are not true. It is true that an author when he places his work before the public invites criticism, and however hostile it may be, the critic is not liable for libel, provided he makes no misstatements of material facts contained in the writing and does not go out of his way to attack the author. The critic must, however, confine himself to criticism and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely for the purpose of exercising his powers of denunciation. If, under the pretext of criticizing a literary production or the acts of one occupying a public position, the critic takes an opportunity to attack the author or occupant, he will be liable in an action for libel. (Cooper *v.* Stone, 24 Wend. 434; Mattice *v.* Wilcox, 71 Hun 485, 488; affirmed 147 N. Y. 624; Hamilton *v.* Eno, 81 N. Y. 116.) . . . The single purpose of the rule permitting fair and honest criticism is that it promotes the public good, enables the people to discern right from wrong, encourages merit, and firmly condemns and exposes the charlatan and the cheat, and hence is based upon public policy. The distinction between criticism and defamation is that criticism deals only with such things as invite public attention or call for public comment, and does not follow a public man into his private life or pry into his domestic concerns. It never attacks the individual, but only his work."

These three cases constitute a distinct departure from the earlier cases in that they recognize a privileged occasion arising out of the

[1] 179 N. Y. 144 (1904).

public interest in the subject matter. But in the first case the court, not content with deciding that a direct defamatory charge is not privileged merely because of its public interest, and without appreciating the distinction between statement and comment, follows the *dictum* of the majority of the American cases in making an untenable distinction between personal and impersonal criticism. Manifestly, however, nothing could be more relevant or more important to the public interest than the fact, if there were any grounds for such an inference, that a public officer has been recreant to his trust. In the two succeeding cases a wider latitude of comment is merely suggested and then practically denied.

For the final stage of legal development in the direction of the true solution of the problem recourse must be had as yet to recent decisions of lower courts. In the case of McDonald *v.* Sun Printing & Pub. Assn.,[1] it appeared that the plaintiff had sought to secure the establishment by Congress of a "laboratory for the study of the abnormal classes," in furtherance of which he published a book entitled "Girls who Answer Personals," giving the result of his communication with young women who had given him accounts of their lives. The defendant characterized the conduct of the plaintiff and the book as shameless, prurient, and a scandal. The trial judge sent the case to the jury on the question whether the inferences of fact drawn by the defendant were reasonably possible, and, therefore, permissible.

"Any one who publishes a book, or does any public act, challenges discussion and criticism. Every one has the right to indulge in such discussion and criticism freely and fully, and to draw inferences and to express opinions on the facts in the same way. . . . In the present case the plaintiff is charged with pruriency, scandal, and shamelessness. This affects his personal character. If his book and his conduct lay him open to the charge, the defendant did not go outside the realm of criticism, and is not liable."

In Howarth *v.* Barlow,[2] it appeared that the clerk of a board of village trustees presented to the trustees for payment a number of bills against the village, among which one of the trustees discovered a bill for lumber purchased by the clerk for his individual use. This trustee placed the matter before the taxpayers' association of the village, which appointed him and the defendant a committee to present it to the grand jury. The defendant discussed the matter with the president of the

[1] 45 N. Y. Misc. 442 (1904).

[2] 113 N. Y. App. Div. 510 (1906).

village, concluding with the statement, "Well, you see the intent. You should call for his resignation, and if he will resign there will be no further trouble." Reversing a judgment for the plaintiff, the court said:

"The plaintiff's whole official conduct in the matter was open to the fullest criticism, and the defendant and all other persons had the right to draw from it and express any opinions or inferences that could be drawn from it, although contrary, and it may be, more reasonable ones, could be drawn from it. That such opinions or inferences are far-fetched, high-strung, or severely moral, or contrary to other opinions or inferences that seem more reasonable, does not matter so long as there be a basis for them in the acts or words of the person who is the subject of such criticism. The majority or prevailing opinion is not the test of whether such opinions or inferences be permissible. The prevailing or majority opinion is often the wrong one. For that reason the law gives full latitude to the expression of any and all opinions on things of general concern. It does not matter that the opinions or inferences expressed are not the most charitable or reasonable ones, or that they are the wrong ones, provided they be based on the facts and the facts are capable of them. This is the rule and latitude of discussion and criticism of the conduct of every one who holds a public office, or writes a book, or does any act by which he invites public attention and criticism. The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism. On the contrary, they have a right to speak out in open discussion and criticism thereof, the only test being that they make no false statement; and this is the great safeguard of free government, and of pure government."

Van Vechten Veeder.

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